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# State v. Cofield: Grand Expansion of Citizen Rights in Grand Jury Selection--The North Carolina Constitution Bars Discrimination in Foreperson Selection

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# *State v. Cofield*: Grand Expansion of Citizen Rights in Grand Jury Selection—The North Carolina Constitution Bars Discrimination in Foreperson Selection

Ernest Richard Cofield has twice had his day in the North Carolina Supreme Court. In its first hearing of *State v. Cofield* (*Cofield I*),[1] the court held that constitutional guarantees against discrimination in grand jury[2] selection apply equally to foreperson selection.[3] The *Cofield* court determined that defendant Cofield established a prima facie case of discrimination in selection of the foreperson of the grand jury that indicted him, and remanded the case to allow the State an opportunity to rebut.[4] In the second chapter of *State v. Cofield* (*Cofield II*),[5] the court held that the State had not met its rebuttal burden and vacated Cofield's indictment and conviction.[6]

This Note reviews the constitutional principles applicable to grand juror selection and how they extend to foreperson selection. It analyzes the supreme court's holding that the State failed to rebut discrimination allegations in *Cofield*. The Note concludes that *Cofield II* clarifies and bolsters the just principles established in *Cofield I*, but that it invites future litigation by failing to enunciate appropriate standards for grand jury foreperson selection.

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1. 320 N.C. 297, 357 S.E.2d 622 (1987).

2. A grand jury is:

> A jury of inquiry . . . whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to be had. . . . This is called a "grand jury" because it comprises a greater number of jurors than the ordinary trial jury or "petit jury." . . . [The grand jury] is an accusatory body and its function does not include a determination of guilt.

BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

Federal court indictment by grand jury is guaranteed by the fifth amendment, which states in pertinent part: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. amend V.

The North Carolina Constitution also provides for formal criminal accusation by grand jury indictment, stating: "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." N.C. CONST. art. I, § 22.

Grand juries in North Carolina have eighteen members. The county clerk of each superior court in the state randomly selects nine new grand jurors from the current jury list at the first court session in which criminal cases are heard following January 1 and July 1 each year. N.C. GEN. STAT. § 15A-622(b) (1988). Grand jurors serve until the subsequent drawing of new jurors, usually resulting in a twelve month term for each juror. *Id.* Following the selection process, the presiding judge appoints one grand juror as foreperson. *Id.* § 15A-622(e). The new jurors and the foreperson take oaths of office. *Id.* § 15A-622(f).

3. The traditional remedy for discriminatory jury selection is invalidation of all previous proceedings against the defendant, without regard to prejudicial impact. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1980) (*see infra* notes 98-107 and accompanying text); Arnold v. North Carolina, 376 U.S. 773 (1964) (*see infra* notes 69-71 and accompanying text); State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968) (*see infra* notes 94-96 and accompanying text).

4. *Cofield I*, 320 N.C. at 309, 357 S.E.2d at 629.

5. 324 N.C. 452, 379 S.E.2d 834 (1989).

6. *Id.* at 464-65, 379 S.E.2d at 840.

In July, 1984, a Northampton County grand jury indicted Ernest Richard Cofield on charges of rape and breaking and entering.[7] Before trial, the defense moved to quash the indictment on the ground that discrimination in the selection of the grand jury foreman denied the black defendant his state and federal constitutional rights to due process and equal protection.[8] The defense introduced evidence that sixty-one percent of the county's total population was black, along with a report, prepared by the Northampton County Clerk of Superior Court, which included racial and sexual identification of all grand jury forepersons from 1960 to the time of Cofield's trial.[9] During that period, Northampton County Superior Court judges made fifty six-month foreperson appointments to thirty-two whites and one black, the latter serving as foreman for two six-month terms.[10] The State offered no rebuttal evidence.[11]

The trial judge denied defendant's motion to quash the indictment.[12] Cofield appealed his subsequent conviction to the North Carolina Court of Appeals,[13] where a divided panel found no error at the trial level and upheld the conviction.[14]

The North Carolina Supreme Court heard *Cofield I* to decide two issues: 1) whether racial discrimination in grand jury foreperson selection should result in invalidation of a defendant's indictment and conviction; and 2) whether defendant Cofield established a prima facie case of discrimination.[15] The court, in an opinion by Chief Justice Exum, held that racial discrimination in grand jury foreperson selection violates the equal protection provision of the North Carolina Constitution[16] and its corollary, specific grant of protection against discriminatory exclusion from jury service;[17] and the fourteenth amendment to the United States Constitution.[18]

The appropriate remedy in foreperson discrimination cases, the court ruled,

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7. For details of the crime, see Note, *State v. Cofield: Petit Deliberation of Grand Jury Discrimination*, 64 N.C.L. REV. 1179, 1180 (1986).

8. *Cofield I*, 320 N.C. at 299, 357 S.E.2d at 624.

9. *Id.*

10. Defendant-Appellant's Brief at 3, *Cofield II* (No. 886SC762).

11. The court noted that the defendant's evidence was uncontradicted. *Cofield I*, 320 N.C. at 300, 357 S.E.2d at 624.

12. *Id.*

13. State v. Cofield, 77 N.C. App. 699, 336 S.E.2d 439 (1985), *rev'd*, 320 N.C. 297, 357 S.E.2d 622 (1987).

14. *Id.* at 705, 336 S.E.2d at 442. Judge Becton disagreed, maintaining that the defendant had established a prima facie case of discrimination. *Id.* at 705, 336 S.E.2d at 442 (Becton, J., concurring in part and dissenting in part). Defendant also contended on appeal that the trial court erroneously applied the North Carolina Fair Sentencing Act. *Id.* at 704, 336 S.E.2d at 442. *See* N.C. GEN. STAT. § 15A-1340.1 (1988). The court of appeals recognized this error and remanded the case for resentencing. *Cofield*, 77 N.C. App. at 704-05, 336 S.E.2d at 442.

15. *Cofield I*, 320 N.C. at 299, 357 S.E.2d at 623.

16. *Id.* at 303, 357 S.E.2d at 626. Article I, § 19 reads in pertinent part: "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. CONST. art. I, § 19.

17. *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626. Article I, § 26 reads: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. art. I, § 26.

18. *Cofield I*, 320 N.C. at 308, 357 S.E.2d at 628-29. The fourteenth amendment to the United States Constitution reads in pertinent part: "[N]or shall any state deprive any person of life, liberty,

is invalidation of all proceedings to date against the defendant.[19] A defendant may establish a prima facie case of discrimination by either of two methods: 1) by showing that the selection procedure was not racially neutral; or 2) by statistical evidence of minority underrepresentation as forepersons for a substantial period of time, notwithstanding adequate presence as grand jury members.[20]

The court found that defendant Cofield met this initial burden of proof with statistical evidence.[21] The State, however, is entitled to rebut a defendant's showing by "offering evidence that the process used in selecting the grand jury foreman in [the] proceedings was in fact racially neutral."[22] Toward that end, the court reversed the court of appeals' decision and remanded the case for a discrimination hearing in superior court.[23]

At the hearing on remand, the State offered testimony from court officers who participated in Cofield's grand jury foreperson selection.[24] Judge Allsbrook, the presiding trial judge, testified that the qualities he considered in choosing a foreperson were leadership ability, fairness, ability to follow instructions, and prior grand jury experience.[25] He did not appoint or fail to appoint a grand jury foreperson based on race.[26] Judge Allsbrook testified that in this case he followed his routine procedure of conferring with local court officials to benefit from their earlier experiences with individual grand jurors.[27] The sheriff, with the concurrence of the clerk of court, recommended Edward Regan, a grand jury member whom the sheriff knew personally and described as educated and responsible.[28] After a conversation with Mr. Regan, Judge Allsbrook appointed him to serve as grand jury foreman.[29]

The defense countered with testimony of six black members of the indicting grand jury to establish that the court did not question these individuals, although they were also educated and responsible, to ascertain their qualifications to serve as foreperson.[30] The hearing court held that the State rebutted defendant's prima facie case by establishing that the foreperson selection "was

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or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Justice Meyer filed an opinion concurring in the result. *Cofield I*, 320 N.C. at 310, 357 S.E.2d at 629 (Meyer, J., concurring). Justice Mitchell, joined by Justice Whichard, also concurred. *Id.* at 310-312, 357 S.E.2d at 630-31 (Mitchell, J., concurring). Justice Webb was the sole dissenter. *Id.* at 312, 357 S.E.2d at 631 (Webb, J., dissenting).

19. *Id.* at 304, 357 S.E.2d at 626-27.

20. *Id.* at 308-09, 357 S.E.2d at 629.

21. *Id.*

22. *Id.* at 309, 357 S.E.2d at 629.

23. *Id.*

24. *Cofield II*, 324 N.C. at 454-55, 379 S.E.2d at 836.

25. *Id.* at 456, 379 S.E.2d at 836.

26. *Id.*

27. *Id.* at 456, 379 S.E.2d at 836-37.

28. *Id.* at 455, 379 S.E.2d at 836. Sheriff Bob Corey died prior to the remand hearing. *Id.* at 455 n.1, 379 S.E.2d at 836 n.1.

29. *Id.* at 456, 379 S.E.2d at 837.

30. *Id.* The defense also presented statistical evidence of Judge Allsbrook's foreman selections over a ten-year period. *Id.* at 456, 379 S.E.2d at 837. The court found this evidence pertinent to establishing a prima facie case, but irrelevant to discrimination against defendant in this particular foreman selection. *Id.* at 456-57, 379 S.E.2d at 837.

not based on the race of the individual and therefore was racially neutral."[31]

The North Carolina Supreme Court granted defendant's petition for discretionary review prior to rehearing by the court of appeals.[32] The court, in an opinion by Justice Meyer, reversed the hearing judge, concluding that the State failed to rebut defendant's prima facie case.[33] The court ruled that the State must show both a racially neutral selection process *and* a racially neutral reason for the individual selection in a particular case to rebut the defendant's case successfully.[34]

In *Cofield II* the State established neutral, non-racial motivation in the individual selection.[35] However, the State failed to establish that the selection process was racially neutral.[36] In fact, the selection process was not racially neutral because the judge considered for appointment only one grand juror, the one who the sheriff knew personally and recommended.[37] The trial court excluded all other grand jurors, black and white, from consideration.[38] Therefore, Justice Meyer reasoned, the trial court's legal conclusion that the selection process was racially neutral was "unsupported by the findings of fact which did not address the failure of the appointing judge to consider all grand jurors."[39]

Justice Meyer concluded that the "recommendation method" used in Cofield's case violates the guarantee against discrimination in jury selection of article I, section 26 of the state constitution.[40] The court announced North Carolina's constitutional standard for grand jury foreperson selection: A presiding judge must consider all grand jurors and must select a foreperson from among them on a racially neutral basis.[41]

Concurring in the result, Justice Mitchell disagreed with the court's standard for selection.[42] He argued that a "consideration" standard suggests a weighing of qualifications among jurors, each of whom is equally qualified by law to serve as foreperson.[43] Justice Mitchell opted for a random selection process as the most racially neutral and, therefore, constitutional method for grand jury foreperson selection.[44]

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31. *Id.* at 457, 379 S.E.2d at 837. The hearing judge made findings of fact, including acknowledging the credibility of the State's witnesses. *See* Superior Court Order at 3-4, State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989) (84-CRS-2657).

32. *Cofield II*, 324 N.C. at 454, 379 S.E.2d at 836.

33. *Id.* at 459, 379 S.E.2d at 838-39. Justice Mitchell concurred in the judgment. *Id.* at 465, 379 S.E.2d at 841 (Mitchell, J., concurring). For a discussion of Justice Mitchell's concurrence, see *infra* notes 135-140 and accompanying text. Justice Webb dissented for the reasons he stated in *Cofield I*. *Id.* at 466, 379 S.E.2d at 842 (Webb, J., dissenting).

34. *Cofield II*, 324 N.C. at 458, 379 S.E.2d at 838.

35. *Id.* at 459-60, 379 S.E.2d at 839.

36. *Id.*

37. *Id.* at 460, 379 S.E.2d at 839.

38. *Id.*

39. *Id.*

40. *Id.* at 460-61, 379 S.E.2d at 839; *see supra* note 17 (text of article I, § 26).

41. *Cofield II*, 324 N.C. at 461, 379 S.E.2d at 839.

42. *Id.* at 465-66, 379 S.E.2d at 842 (Mitchell, J., concurring).

43. *Id.* (Mitchell, J., concurring).

44. *Id*; *see infra* text accompanying notes 176-87 (discussion of random and other selection methods).

The North Carolina Supreme Court's *Cofield* rulings, extending the constitutional principle of equal protection to selection of grand jury forepersons, are grounded in more than a century of federal and state equal protection precedent prohibiting discrimination in grand and petit jury selection.[45] In *Norris v. Alabama*[46] the United States Supreme Court considered the quantum of evidence needed to establish a prima facie case of discrimination in jury selection[47] and the rebuttal required to defeat the charge.[48] Defendant in *Norris* was a black man convicted of rape and sentenced to death by an all white jury.[49] He established a prima facie case of discrimination by presenting statistical evidence of a long history of exclusion of blacks from grand and petit jury service and corollary testimony of area blacks qualified to serve.[50] Alabama offered as rebuttal the assurance of three jury commissioners that they had not excluded any county resident from jury service based on race.[51] The Court held that the State could not rebut defendant's strong case of long-term, sweeping exclusion with "mere generalities,"[52] lest the constitutional guarantees of equal protection become "but a vain and illusory requirement."[53].

Almost twenty years later, in *Hernandez v. Texas*,[54] the Supreme Court reaffirmed its stance in *Norris*. The Court held in *Hernandez* that systematic exclusion of Mexican Americans from grand and petit juries violated the petitioner's right to equal protection.[55] Evidence of total exclusion of Mexicans from among 6000 jurors selected over twenty-five years overwhelmed the State's rebuttal testimony of five jury commissioners that they had not discriminated in their efforts to select the best qualified jurors.[56]

The Court addressed jury selection challenges in two 1967 Georgia cases. In *Whitus v. Georgia*[57] the Court rejected the selection of jurors by county jury commissioners based on personal acquaintance.[58] In *Jones v. Georgia*[59] the Court added that a state could not rebut prima facie evidence of racial discrimination in jury selection with bald assumptions that public officials discharged

45. *See* Strauder v. West Virginia, 100 U.S. 303 (1879); Neal v. Delaware, 103 U.S. 370 (1880); State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902).

46. 294 U.S. 587 (1935).

47. *Id.* at 591.

48. *Id.* at 597-99.

49. *Id.* at 588.

50. *Id.* at 591.

51. *Id.* at 597-98. One commissioner testified in person. The other two submitted affidavits. *Id.*

52. *Id.* at 598.

53. *Id.*; *see also* Smith v. Texas, 311 U.S. 128, 132 (1940) ("If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.").

54. 347 U.S. 475 (1954).

55. *Id.* at 476-77, 481-82. Defendant was indicted and convicted of murder by all white juries. *Id.* at 476-77.

56. *Id.* at 481-82.

57. 385 U.S. 545 (1967).

58. *Id.* at 552. The *Whitus* Court also noted the opportunity for discrimination in the sources used to compile a revised, allegedly non-exclusionary jury list. *Id.* at 551. The Court concluded, "[W]e cannot say on this record that [discrimination] was not resorted to by the commissioners." *Id.* at 552.

59. 389 U.S. 24 (1967) (reversing murder conviction).

their duties properly and jury commissioners eliminated prospective jurors based only on their competency to serve and not because of race.[60]

The State of Louisiana attemped to rebut a grand jury discrimination claim with evidence of non-discriminatory practice in *Alexander v. Louisiana*.[61] In that case a black defendant challenged his rape conviction.[62] The clerk of court, who also served as one of five white jury commissioners, denied that race was a selection factor and testified that he compiled the mailing list for questionnaires, responses to which were used to make the jury selections, from nonracial sources.[63] The Court found this rebuttal testimony inadequate because the questionnaires reflected potential jurors' races, and the commissioners, culling the data, eliminated most blacks from the final roster.[64] Although defendant presented no evidence that the jury commissioners consciously selected by race,[65] the procedure was susceptible to abuse and " 'the result bespeaks discrimination whether or not it was a conscious decision on the part of any individual jury commissioner.' "[66]

In *Castaneda v. Partida*[67] the Supreme Court held that a Mexican-American had proven his claim of discriminatory grand jury selection.[68] The Court suggested two major evidentiary avenues available to states for rebuttal.[69] First, states could offer testimony of jury commissioners, detailing the selection procedures employed.[70] Second, states could present evidence challenging defendants' statistics with valid statutory qualifications for jury participation such as citizenship, county residency, literacy, moral character, and lack of criminal conviction or pending indictment.[71] The Court emphasized that, although Texas did not rebut the statistical proof of discrimination in *Castaneda*, the State could do so in another case.[72]

Like the federal courts, the North Carolina Supreme Court, in a line of cases beginning with *State v. Peoples*,[73] held that arbitrary racial exclusion from

60. *Id.* at 25. In a third Georgia case, a group of black residents challenged Georgia's statutory scheme for selecting juries and school boards. Turner v. Fouche, 396 U.S. 346, 348 (1970). Appellants, the Court ruled, had shown that the percentage disparity between the number of blacks living in the county and the number accepted for jury duty resulted, at least in part, from jury commissioners' use of subjective judgment in lieu of objective criteria. *Id.* at 360. The absence of explanation for the overwhelming disqualification of blacks as not upright or intelligent, the Court held, evidenced a vacuum in the record " 'which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination.' " *Id.* at 361 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953) (overturning rape conviction after State's failure to rebut prima facie case of discrimination in jury selection)).

61. 405 U.S. 625 (1972).

62. *Id.* at 626-27.

63. *Id.* at 632.

64. *Id.* at 630, 632.

65. *Id.* at 630.

66. *Id.* at 632 (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)).

67. 430 U.S. 482 (1977).

68. *Id.* at 483-84, 501.

69. *Id.* at 498-99.

70. *Id.* at 498.

71. *Id.* at 498-99.

72. *Id.* at 499.

73. 131 N.C. 784, 42 S.E. 814 (1902).

grand jury service violates the right to equal protection of members of the excluded race.[74] In *State v. Arnold*,[75] however, the court refused to reverse the decision below, denying an unrebutted discrimination claim.[76] The United States Supreme Court, in a per curiam opinion, summarily dismissed the state court's ruling that the two black defendants had not made out a prima facie case of exclusion from grand jury service.[77] Because the State had offered no independent rebuttal evidence, the Court reversed the judgment below.[78]

After the Supreme Court's reversal in *Arnold*, the North Carolina Supreme Court in *State v. Wilson*[79] reviewed the denial of a black defendant's motion to quash his rape indictment because of systematic exclusion of blacks from grand jury service in Cleveland County.[80] Citing *Arnold*, the North Carolina court set forth a method for establishing a prima facie case of discriminatory grand jury exclusion and defined the corollary evidence needed to rebut such a showing.[81] Mere denial by the officials in charge is inadequate rebuttal.[82] The court ruled that successful rebuttal requires "a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts."[83]

Commenting on whether jury selection in Cleveland County actually had been discriminatory, the court noted, "[i]t is quite probable that it has not; the presumption is that public officials have performed their duties in a fair, legal and constitutional manner."[84] The burden of proof rests on the defendant.[85] The

74. *Id.* at 791, 42 S.E. 816; *see, e.g.*, State v. Perry, 250 N.C. 119, 108 S.E.2d 447 (1959) (systematic racial exclusion from grand jury service violates equal protection clause of fourteenth amendment), *cert. denied*, 361 U.S. 833 (1959); Miller v. State, 237 N.C. 29, 74 S.E.2d 513 (1953) (defendant has right to demand indictment and trial by jury from which blacks are not excluded because of race), *cert. denied*, 345 U.S. 930 (1953).

In a much earlier case, the North Carolina Supreme Court denied a trial judge's right to direct the selection of jurors of a particular race. *See* Capehart v. Stewart, 80 N.C. 101, 103 (1879). Through such a process, the court stated, "class distinctions, which the recent amendments to the constitution of the United States and our own [state] constitution conforming thereto are intended to abolish, would be introduced in the practical operations of our judicial system, and in trials by jury, its most vital and valuable part." *Id.*

75. 258 N.C. 563, 129 S.E.2d 229 (1963), *rev'd per curiam*, 376 U.S. 773 (1964).

76. *Id.* at 578, 129 S.E.2d at 239.

77. Arnold v. North Carolina, 376 U.S. 773, 774 (1964) (per curiam).

78. *Id.* at 774. Defendants presented statistical evidence of blacks qualified for jury service and testimony of the clerk of court that only one black had served on a grand jury during the clerk's twenty-four year term. The State merely cross-examined defendants' witnesses. *Id.* at 773-74.

79. 262 N.C. 419, 137 S.E.2d 109 (1964).

80. *Id.* at 420, 137 S.E.2d at 111.

81. *Id.* at 421-22, 137 S.E.2d at 112. If a defendant shows a substantial black population in the relevant county, coupled with no more than token black participation on grand juries "over a long period of time, such showing makes out a *prima facie* case of systematic exclusion of Negroes from service on the grand jury because of race." *Id.* (citing *Arnold*, 376 U.S. at 773-74; Norris v. Alabama, 294 U.S. 587, 590-91 (1935)).

82. *Id.* at 422, 137 S.E.2d at 112 (citing Hernandez v. Texas, 347 U.S. 475, 481 (1954); *Norris*, 294 U.S. at 594).

83. *Id.*

84. *Id.* at 423, 137 S.E.2d at 113. The United States Supreme Court later ruled that such a presumption is not adequate to rebut a prima facie case. Jones v. Georgia, 389 U.S. 24, 25 (1967). *See supra* notes 65-66 and accompanying text.

State, however, cannot rely solely on the burden of proof rule, but should offer evidence to provide the trial judge with crucial facts needed to make material findings.[86] Those findings are generally conclusive on appeal.[87]

In *State v. Lowry*,[88] decided the same year as *Wilson*, the court clarified the State's burden to "show facts with respect to the management of the jury system sufficient to clearly overcome defendant's *prima facie* showing."[89] The court suggested in *Lowry* that the State should have called the sheriff and county commissioners to testify, and should have presented copies of jury lists.[90] Instead, the State relied solely on cross examination. The trial court reached negative, general conclusions that no systematic exclusion of blacks existed.[91] The supreme court reversed, finding the evidence far short of the positive factual showing required to rebut a valid discrimination claim.[92]

The court further defined the parameters for successful rebuttal in *State v. Wright*,[93] a consolidated trial of a group of black defendants charged and convicted in Pamlico County with resisting and obstructing arrest.[94] To rebut a discrimination claim, the court held that the State must show "no intentional and designed discrimination against the members of the defendant's race at any part of the processes culminating in the selection of the grand jury by which he was indicted."[95]

In each of these cases, the State's failure to rebut a defendant's showing of discrimination in grand jury selection invalidated the defendant's indictment, irrespective of any prejudicial effect on the outcome of the case.[96] *Cofield* marked the first time the court related this precedent to an equal protection claim limited to selection of a grand jury foreperson.

The United States Supreme Court addressed the foreperson issue when it considered application of the fourteenth amendment's equal protection guarantee to foreperson selection in *Rose v. Mitchell*.[97] The *Rose* defendants, two black men convicted of murder in Tennessee, charged discrimination in the choice of the foreperson of the grand jury that indicted them.[98] The Court implicitly recognized that such discrimination, if proved, would constitute an equal protec-

85. *Wilson*, 262 N.C. at 423, 137 S.E.2d at 113.

86. *Id.*

87. *Id.*

88. 263 N.C. 536, 139 S.E.2d 870 (1965), *cert. denied and appeal dismissed*, 382 U.S. 22 (1965) (per curiam).

89. *Id.* at 548, 139 S.E.2d at 879.

90. *Id.* The court noted that the superior court officers did not save jury lists that included the names of all potential jurors ultimately excluded, as well as those chosen to serve. *Id.* After selection of each new jury, the underlying list was destroyed. *Id.*

91. *Id.*

92. *Id.*

93. 274 N.C. 380, 163 S.E.2d 897 (1968).

94. *Id.* at 382, 163 S.E.2d at 899.

95. *Id.* at 392, 163 S.E.2d at 906.

96. *See, e.g.*, State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965), *cert. denied and appeal dismissed*, 382 U.S. 22 (1965) (per curiam); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

97. 443 U.S. 545 (1979).

98. *Id.* at 547.

tion violation and "assume[d] without deciding that discrimination with regard to the selection of only the foreman" would require the same remedy as discriminatory selection of jurors.[99] That remedy is invalidation of the indictment and conviction,[100] even without prejudicial impact, because racial discrimination "strikes at the fundamental values of our judicial system and our society as a whole."[101]

Holding that respondents in *Rose* had failed to prove an equal protection claim,[102] the Court enunciated the method by which defendants may establish a prima facie case of foreperson discrimination.[103] Echoing the procedure to show discriminatory underrepresentation in the grand jury body, the Court described a defendant's task as threefold: 1) to establish membership in a " 'distinct class, singled out for different treatment under the laws;' "[104] 2) to prove statistically the degree of underrepresentation by a proportional comparison in the relevant population of group size to the number of group members serving as forepersons " 'over a significant period of time;' "[105] and 3) to support the statistical evidence of discrimination by showing " 'a selection procedure that is susceptible of abuse or is not racially neutral.' "[106]

Five years after *Rose*, in *Hobby v. United States*,[107] the Supreme Court addressed an allegation of discrimination in foreperson selection brought by a white male defendant on due process grounds.[108] The Court did not consider the merits of defendant Hobby's allegation, confining its holding instead to the narrow issue of remedy.[109] Although the Court previously had quashed the indictment and conviction of a white man based on a due process claim of discriminatory exclusion of blacks from jury service,[110] it declined to extend the reversal remedy to discrimination in selection of federal grand jury foreper-

99. *Id.* at 551-52 n.4.

100. *Id.* at 551. *See, e.g.*, Carter v. Texas, 177 U.S. 442 (1900) (trial court, without hearing evidence, overruled defendant's motion to quash murder indictment because of discrimination in grand jury selection; Supreme Court reversed subsequent conviction); Pierre v. Louisiana, 306 U.S. 354 (1939) (reversing murder conviction because trial judge denied motion to quash grand jury indictment, although judge heard defendant's evidence, sustained motion to quash petit jury panel, and petit jury, composed of black and white jurors, convicted petitioner); Reece v. Georgia, 350 U.S. 85 (1955) (black defendant's motion to quash indictment because of exclusion of blacks from grand jury service denied without consideration of merits because motion filed too late; Supreme Court found denial of due process and reversed), *cert. denied*, 350 U.S. 943 (1956).

101. *Rose*, 443 U.S. at 556.

102. *Id.* at 574.

103. *Id.* at 565.

104. *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

105. *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

106. *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

107. 468 U.S. 339 (1984).

108. *Id.* at 341, 343. Hobby, convicted on federal fraud charges, claimed that underrepresentation of blacks and women as grand jury forepersons in the Eastern District of North Carolina resulted in a violation of his fifth amendment due process right to a fair trial. *Id.* at 340-41. The United States Court of Appeals for the Fourth Circuit affirmed Hobby's conviction. *Hobby v. United States*, 702 F.2d 466 (4th Cir. 1983), *aff'd*, 468 U.S. 339 (1984).

109. *Hobby*, 468 U.S. at 340.

110. Peters v. Kiff, 407 U.S. 493, 504-05 (1972) ("[W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies due process of law.").

sons.[111] Addressing defendant's due process right to fundamental fairness, the Court compared the due process concern that the total grand jury represent all segments of the community[112] to "alleged discrimination pertain[ing] only to the selection of a foreman . . . of a properly constituted federal grand jury."[113] It found the latter "is not so significant to the administration of justice . . . so as to undermine the integrity of the indictment."[114]

The *Hobby* Court distinguished its holding from *Rose* on three bases. First, the defendants in *Rose* brought their discrimination allegation on equal protection grounds as members of the allegedly excluded class, whereas Hobby alleged a due process violation.[115] Second, the *Rose* judge made his foreperson appointment from the population at large, not from the empanelled jury as in *Hobby*.[116] Third, the powers and responsibilities of the Tennessee foreperson "stand in sharp contrast to the ministerial powers of the federal counterpart, who performs strictly clerical tasks."[117] Based on these differences, the Court concluded that setting aside a verdict would be inappropriate "in the very different context of a due process challenge by a white male to the selection of foremen of federal grand juries."[118]

Since *Hobby*, the Supreme Court has reaffirmed the principle that exclusion of recognized minorities from *jury service* constitutes fatal error.[119] However, the Court has not addressed any other equal protection claims for grand jury foreperson selection, such as that in *Rose*.[120] A number of state and federal courts have construed *Hobby* to mean that the Supreme Court has rejected reversal as a remedy for racial discrimination in grand jury foreperson selection on any constitutional grounds, unless the foreman has constitutionally significant duties.[121]

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111. *Hobby*, 468 U.S. at 344.

112. *Id.* at 345 (citing *Peters*, 407 U.S. at 503).

113. *Id.*

114. *Id.*

115. *Id.* at 347.

116. *Id.* at 347-48. In the federal system, judges select the grand jury forepersons from jury members. "The federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge." *Id.* at 348.

117. *Id.*

118. *Id.* at 349.

119. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 261-62 (1986) (harmless error irrelevant to rule requiring reversal of conviction of defendant following indictment by grand jury from which members of his race were excluded systematically); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (prosecutor's use of peremptory challenges to all blacks available for jury service may be enough evidence to establish prima facie case of purposeful discrimination).

120. Rose v. Mitchell, 443 U.S. 545, 545 (1979).

121. *See, e.g.*, Turner v. State, No. 149669 (Miss. 1989) (WESTLAW, Allstates library) (equal protection claim, distinguishing *Rose* because Mississippi grand jury foreperson, unlike Tennessee foreperson, has no discretionary responsibility); State v. Jefferson, 769 S.W.2d 875 (Tenn. Crim. App. 1988) (disagreeing with *Hobby* and *Rose* dicta discussing Tennessee foreperson selection, finding issue of discrimination in foreperson selection subsumed in issue of discrimination in jury selection, and holding that no systematic racial exclusion existed), *cert. denied*, 109 S. Ct. 315 (1988); Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988) (rejecting reversal of conviction as remedy for equal protection claim of discrimination in appointment of jury commissioners in Kentucky), *cert. denied*, 109 S. Ct. 315 (1988); State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987) (rejecting equal protec-

The North Carolina Court of Appeals so reasoned in *State v. Gary*.[122] The *Gary* court, addressing a black defendant's equal protection claim, compared the duties of a North Carolina grand jury foreperson[123] to those of his counterparts in Tennessee and in the federal system. The court concluded that in North Carolina "[w]ith the exception of presiding, [the] statutory duties appear entirely ministerial. Clearly these duties in no way approach the level of authority exercised by the Tennessee foreman in *Rose*."[124]

In *Cofield I* the North Carolina Supreme Court disagreed with this interpretation of *Hobby* and overruled *Gary*.[125] The court found the *Hobby* due process analysis inapposite to an equal protection claim raised by a member of a recognized class of discrimination victims.[126] The court declined to examine the nature of a North Carolina foreperson's duties, holding the inquiry irrelevant to evaluating or remedying an equal protection violation under both the state[127] and federal Constitutions.[128] If the defendant is a member of the excluded class,[129] exclusion based on racial criteria during foreperson selection, as in the selection of the grand jury itself, makes the judicial process "fatally flawed."[130] The absence of prejudicial effect on a particular defendant is not germane.[131] What is critical, the court ruled, is the evenhanded operation of a democratic system of justice, true "to the letter and spirit of our constitution."[132]

Justice Meyer concurred based on the federal constitutional analysis in *Cofield I*, but found the court's state constitutional analysis unnecessary.[133] Justice

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tion claim of underrepresentation of blacks as grand jury forepersons because foreperson role in New Jersey, like that of federal forepersons, is not constitutionally significant).

122. 78 N.C. App. 29, 337 S.E.2d 70 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E.2d 586 (1986), *overruled in part*, State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

123. The foreperson in North Carolina presides over hearings, administers oaths to witnesses, signs indictments indicating the witnesses examined, and requests for the grand jury as a whole the calling of additional witnesses. N.C. GEN. STAT. § 15A-623(b), (c), § 15A-626 (1988). The foreperson may also excuse up to two jurors from attendance at any grand jury session. *Id.* § 15A-622(d).

124. *Gary*, 78 N.C. App. at 33, 337 S.E.2d at 73.

125. *Cofield I*, 320 N.C. at 307, 357 S.E.2d at 628 ("To the extent that *Gary* is inconsistent with our holding today, it may no longer be considered authoritative.").

126. *Id.*

127. *Id.* at 304, 357 S.E.2d at 626.

128. *Id.* at 308, 357 S.E.2d at 628-29. The Fourth Circuit appears to read *Hobby* to mean that the basis for a claim of discrimination in grand jury foreperson selection is membership in the allegedly exluded class. United States v. Manbeck, 744 F.2d 360, 370-71 (4th Cir. 1984) (discrimination claim not examined on merits because record provided no information on defendants' race), *cert. denied*, 469 U.S. 1217 (1985). Other courts read *Hobby* as differentiating remedies for discrimination depending upon the substantive or ministerial nature of forepersons' duties in particular jurisdictions. *See, e.g.*, State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987) (foreperson role in New Jersey, like that of federal forepersons, is not constitutionally significant).

129. *Cofield I*, 320 N.C. at 306, 357 S.E.2d at 627-28.

130. *Id.* at 304, 357 S.E.2d at 626-27.

131. *Id.* at 304, 357 S.E.2d at 626.

132. *Id.* at 303, 357 S.E.2d at 626. Subsequently, the court found that "defendant's rights under the Equal Protection Clause of the Fourteenth Amendment [of the federal Constitution] are coextensive with his separate and independent equal protection rights under Article I, Sections 19 and 26 of the North Carolina Constitution." *Id.* at 308, 357 S.E.2d at 628-29. For the text of article I, sections 19 and 26, see *supra* notes 16 and 17.

133. *Cofield I*, 320 N.C. at 310, 357 S.E.2d at 629-30 (Meyer, J., concurring).

Mitchell, also concurring, reached precisely the opposite conclusion.[134] The court should have decided *Cofield*, Justice Mitchell wrote, solely on the basis of article I, section 26 of the North Carolina Constitution, which guarantees jury selection free of discriminatory exclusion.[135] In his view, that single ground sufficed to decide the issue. Justice Mitchell noted that the state supreme court's decision relative to the North Carolina Constitution is final, binding even the United States Supreme Court.[136] Having decided the case on independent state grounds, he concluded, the court should not also address federal constitutional issues on which its word is not final.[137]

Analyzing the State's rebuttal on remand of Cofield's prima facie case of discrimination, the *Cofield II* court relied solely on the state Constitution to reiterate its *Cofield I* holding that the method used to select grand jury forepersons must be racially neutral.[138] Justice Meyer, writing for the court in *Cofield II*, did not implicate the United States Constitution in his opinion. Given the conflicting conclusions of other courts' attempting to correlate the Supreme Court's equal protection analysis in *Rose*[139] and due process analysis in *Hobby*,[140] the court wisely based its holding exclusively on the North Carolina Constitution. That decision, as Justice Mitchell had noted, is final.[141]

In *Hobby* the United States Supreme Court definitively drew a federal constitutional line: The remedy for discrimination in jury selection is reversal on either equal protection or due process grounds.[142] Discrimination restricted to grand jury foreperson selection may be reversible error only when a defendant in a federal court is a member of the excluded class.[143] Because of the ministerial nature of a federal foreperson's duties, the Court refused to recognize due process as an appropriate constitutional basis for a *Cofield*-type claim.[144]

The North Carolina Supreme Court decided *Cofield I* on equal protection grounds, limiting its holding to defendants who are members of the allegedly excluded class.[145] In his concurring opinion, Justice Mitchell, joined by Justice

134. *Id.* at 310, 357 S.E.2d at 630 (Mitchell, J., concurring).

135. *Id.* at 311, 357 S.E.2d at 630 (Mitchell, J., concurring).

136. *Id.* (Mitchell, J., concurring).

137. *Id.* (Mitchell, J., concurring).

138. *Cofield II*, 324 N.C. at 460, 379 S.E.2d at 839.

139. 443 U.S. 545 (1979).

140. 468 U.S. 339 (1984). *See supra* notes 116-119 and accompanying text.

141. *Cofield I*, 320 N.C. at 311, 357 S.E.2d at 630 (Mitchell, J., concurring).

142. *Hobby*, 468 U.S. at 342, 346.

143. The *Rose* Court, in the context of an equal protection claim, assumed without deciding that discrimination in selection of only the foreperson of a grand jury, like discrimination in selection of the grand jury itself, would invalidate a subsequent conviction. *Rose*, 443 U.S. at 551-52, n.4 The *Hobby* Court, distinguishing *Rose* from the due process claim in *Hobby*, further implied that the invalidation remedy might be appropriate in an equal protection case in a federal court. *Hobby*, 468 U.S. at 347 (1984). The Court noted that Hobby, a white male, had not "suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries." *Id.*

144. *See supra* text accompanying notes 97-103.

145. *Cofield I*, 320 N.C. at 306, 357 S.E.2d at 627-28.

Whichard, disagreed with this limitation.[146] Justice Mitchell wrote that the citizens of North Carolina enacted article I, section 26 of the state constitution by direct, popular vote.[147] He suggested that state voters did not intend that "to raise questions concerning alleged violations of this section, a person must be a member of any cognizable racial or ethnic group."[148]

Although the court did not adopt Justice Mitchell's position, the majority in *Cofield I* did view article I, section 26 as "intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case."[149] The court also noted that the people incorporated into the state constitution the ban against discrimination in jury selection at the same time they incorporated the equal protection guarantee,[150] "yet [the ban] was not considered redundant."[151] The section is a declaration by North Carolinians, the court stated, that they "will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. . . . [T]he judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction."[152]

The court's language implies that a white defendant's due process claim, like that of defendant Hobby under federal law,[153] may be cognizable under article I, section 26 of the state constitution. However, the court also implied in *Cofield I* that it might address a due process claim in foreperson selection by analyzing the nature of a foreperson's duties in North Carolina. The court specifically disagreed with the New Jersey Supreme Court, which had applied *Hobby* in rejecting an equal protection challenge because of the ministerial nature of the foreperson's duties in that state.[154] The United States Supreme Court in *Hobby*, the court found, made a crucial distinction between equal protection and due process claims.[155] The court considered the ministerial or substantive nature of forepersons' duties immaterial in the equal protection context under the North Carolina Constitution, leaving undetermined its view of the relevance of those duties to a due process analysis.[156]

The court's holding in *Cofield II* did not clarify the issue of standing to raise a *Cofield* claim in North Carolina. Nor did the court suggest whether a due process challenge by a defendant who was not a member of an excluded class necessarily would turn on its analysis of a North Carolina foreperson's duties, or, if so, whether it would ultimately find those duties substantive enough to extend *Cofield* protection to all defendants. However, the court did note in

146. *Id.* at 310, 357 S.E.2d at 630 (Mitchell, J., concurring).
147. *Id.* at 311, 357 S.E.2d at 630 (Mitchell, J., concurring).
148. *Id.* at 310, 357 S.E.2d at 630 (Mitchell, J., concurring).
149. *Id.* at 304, 357 S.E.2d at 626.
150. N.C. CONST. art. I, §§ 19, 26.
151. *Cofield I*, 320 N.C. at 302 n.3, 357 S.E.2d at 625 n.3.
152. *Id.* at 302, 357 S.E.2d at 625.
153. *See supra* note 108 and accompanying text.
154. *Cofield I*, 320 N.C. at 307, 357 S.E.2d at 628 (citing State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987)).
155. *Cofield I*, 320 N.C. at 307-08, 357 S.E.2d at 628.
156. *Id.* at 304, 357 S.E.2d at 626.

both *Cofield* opinions that, "[t]he foreman, by his very title, is distinguished from other members of the grand jury."[157] In *Cofield I* the court added, "As the titular head of the grand jury, the foreman is first among equals, both in the eyes of his fellow jurors and in the eyes of the public."[158] Based on this analysis, the court found that "[d]iscrimination in the selection of grand jury foremen is no less wrong, and no less contrary to the letter and spirit of our constitution, than discrimination in the selection of jurors generally."[159] The implication is strong that the North Carolina Constitution guarantees to all citizens protection against discrimination in grand jury foreperson selection.[160]

The *Cofield I* court instructed the State that it could rebut defendant's prima facie case "by offering evidence that the process used in selecting the grand jury foreman in *these proceedings* was in fact racially neutral."[161] The inquiry would concern only the selection of the foreperson of the grand jury that indicted the defendant.[162] The court implied that the State could rebut a defendant's prima facie case by establishing that the judge and other court officers involved in the selection decision had chosen the foreperson for non-racial reasons. In *Cofield II* the court concluded that the judge had in fact selected the foreman with "not the slightest hint of racial motivation."[163] Nonetheless, the court rejected the State's rebuttal. Subtly increasing the burden of proof to rebut a discrimination claim, the *Cofield II* court held that the State must "show both a racially neutral selection process and a racially neutral reason for the grand jury foreman's selection in [the particular] case."[164]

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157. *Cofield II*, 324 N.C. at 457, 379 S.E.2d at 837 (quoting *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626).

158. *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626.

159. *Cofield II*, 324 N.C. at 457, 379 S.E.2d at 837 (quoting *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626).

160. In appropriate cases, defense attorneys are likely to consider *Cofield* challenges for all criminal defendants, regardless of race or sex, "unless and until this issue is definitively settled to the contrary by the North Carolina Supreme Court." Rudolf & Maher, *Litigating Grand Jury Foreperson Discrimination Claims*, Trial Briefs, 4th Quarter 1989, at 19.

Thus, the practical effect of *Cofield II* on criminal practice in North Carolina is not yet clear. However, the court limited the potential effect by ruling that its holding, imposing upon trial judges a duty to consider all grand jurors and to select from among them without regard to race, would apply only to grand jury foreperson selections following certification of the *Cofield II* opinion. *Cofield II*, 324 N.C. at 461, 379 S.E.2d at 839.

In addition, to charge error on appeal, North Carolina law requires that a defendant first allege a *Cofield* claim to the trial court. *See* N.C. GEN. STAT. § 15A-1446(a) (1988) ([E]rror may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion.).

Even if a defendant does mount a successful *Cofield* challenge, the defendant is not, therefore, free. Telephone interview with Daniel R. Pollitt, Assistant Appellate Defender of North Carolina (April 11, 1990). Although the appellate court would invalidate all prior proceedings in the case, the State retains the power to reindict and retry the defendant. *Id.* In Ernest Cofield's case, the State did reindict. *Id.* Cofield waived his rights, pleading guilty to second degree rape and felonious breaking and entering. *Id.* He was sentenced to eighteen years for rape and three years for breaking and entering, with the sentences running concurrently and with credit for time served since his initial conviction in July, 1984. *Id.*

161. *Cofield I*, 320 N.C. at 309, 357 S.E.2d at 629 (emphasis added).

162. *Id.*

163. *Cofield II*, 324 N.C. at 459, 379 S.E.2d at 839.

164. *Id.* at 458, 379 S.E.2d at 838.

Reviewing the State's rebuttal evidence at the hearing on remand, the *Cofield II* court acknowledged that the qualities sought by the selecting judge and exhibited by the selected foreman were "legitimate *racially neutral* selection criteria . . . reasonably related to the leadership role of the grand jury foreman."[165] To that extent the court accepted the hearing judge's findings of fact, expressing satisfaction "that there was not the slightest hint of racial motivation in Judge Allsbrook's selection."[166]

Despite this affirmation of the State's evidence, the court held erroneous the hearing judge's conclusion of law that the State had rebutted defendant's prima facie case.[167] The court found that the underlying selection process, in which the court officers recommended, considered, and appointed only one juror, was not racially neutral.[168] Separating the non-racial reason for the individual selection from the non-neutral selection method, the court found the latter discriminatory because the appointing judge considered no other grand jurors, black or white, for the position of foreperson.[169] That recommendation process, by excluding some jurors from equal consideration for service as foreperson, violates the article I, section 26 guarantee of jury selection free of discrimination.[170]

Both federal and state precedent support the distinction between a trial judge's stated reasons, even racially neutral reasons, for a selection and the discriminatory effect of considering only jurors recommended by other court officers. In cases dealing with discriminatory jury selection, the North Carolina Supreme Court has ruled consistently that mere denial of discriminatory intent by the selectors does not negate discriminatory effects.[171] The same standard must apply to rebuttal evidence in foreperson selection. Absent that correlation, the court would be requiring objective proof of non-racial jury selection methods, while allowing judges merely to point to reasonable subjective criteria to overcome allegations of discriminatory foreperson selection. Rejecting that anomaly, the court held that trial judges must choose forepersons on racially neutral bases, selecting from among the panel members after ensuring "that all grand jurors are considered."[172] The court clearly regards each juror as a candidate for foreperson and requires that trial judges, after considering all jurors, must exercise color-blind selection.[173]

Unfortunately, the general principle of color blindness is the only guidance the court offered to lower courts in *Cofield II*. The "consideration" standard fails to enumerate exactly what factors trial judges should consider, leaving the onus on each judge to establish selection criteria individually. If those criteria

165. *Id.* at 459, 379 S.E.2d at 838.
166. *Id.* at 459, 379 S.E.2d at 839.
167. *Id.* at 459-60, 379 S.E.2d at 839.
168. *Id.*
169. *Id.* at 460, 379 S.E.2d at 839.
170. *Id.* at 460-61, 379 S.E.2d at 839.
171. *See* State v. Wilson, 262 N.C. 419, 422, 137 S.E.2d 109, 112 (1964); State v. Wright, 274 N.C. 380, 392, 163 S.E.2d 897, 906 (1968).
172. *Cofield II*, 324 N.C. at 461, 379 S.E.2d at 839.
173. *Id.*

are qualitative, facially neutral standards could prove to be operationally discriminatory. Furthermore, the court does not suggest how much consideration is sufficient to make the process presumptively neutral. The "consideration" standard is vague and likely to require clarification. The court could and should have avoided that likelihood by articulating one or more constitutionally acceptable selection methods.

There are several alternative procedures that the legislature could enact or the court could enunciate to guide trial courts in jury foreperson selection. Courts could use the random selection procedure recommended by Justice Mitchell in his concurring opinion.[174] Such a procedure appears to be nondiscriminatory and would be administratively simple. It avoids the "first among equals" implication by which the court described the jury foreman in *Cofield I*.[175] If the foreperson needs no qualifications beyond those required of a juror, as Justice Mitchell suggested,[176] the procedure may be appropriate.

However, grand jury forepersons do have some special duties. The foreperson presides at jury hearings,[177] administers oaths to witnesses,[178] and may excuse up to two jurors from attendance at any grand jury session.[179] Random selection would seem to be the best solution only if the court deems the functions performed by the foreperson to be essentially ministerial. To the extent that the foreperson should have leadership ability, some qualitative criteria seem appropriate.

A second alternative is for the grand jurors themselves to select forepersons. In Georgia, for example, a judge may appoint a foreperson or may leave the selection to the jurors.[180] In North Carolina, however, a statute directs judges to make appointments, so initiation of such a procedure may require legislative action.[181] The major drawback of this method is that the jurors themselves

174. *Id.* at 465-66, 379 S.E.2d at 841-42 (Mitchell, J., concurring). Justice Mitchell recommended that random foreperson selection could be accomplished by simply drawing a name, just as names are drawn from a container to determine grand jury membership. *Id.* (Mitchell, J., concurring) In that way, each grand jury member would have an equal chance to serve as foreperson. *Id.* (Mitchell, J., concurring) Justice Meyer, writing for the majority, specifically noted that the court was not deciding whether random selection satisfied its directive that all grand jurors be considered for the foreperson position. *Id.* at 460 n.2, 379 S.E.2d at 839 n.2.

175. *Cofield I*, 320 N.C. at 303, 357 S.E.2d at 626.

176. Justice Mitchell noted that North Carolina law enumerates the qualifications jurors need to serve on both petit and grand juries. *Cofield II*, 324 N.C. at 465, 379 S.E.2d at 842 (Mitchell, J., concurring). He commented that no additional qualifications are necessary for foreperson service. *Id.* (Mitchell, J., concurring)

To serve as jurors in accordance with North Carolina law, individuals must be citizens of the State and residents of the relevant county who have not served during the previous two years and who are eighteen or older, physically and mentally competent, and able to hear and understand English. N.C. GEN. STAT. § 9-3 (1986). They must not have been convicted of a felony or pleaded guilty or nolo contendere to a felony charge unless they subsequently reinstated their citizenship through legal process. *Id.*

177. N.C. GEN. STAT. § 15A-623(b) (1988).

178. *Id.*

179. *Id.* § 15A-622(d).

180. GA. CODE ANN. § 15-12-67(a) (1985) ("The judge of the superior court may appoint the foreman of the grand jury or may direct the grand jury to elect its own foreman.").

181. N.C. GEN. STAT. § 15A-622(e) (1988) ("[T]he presiding judge must appoint one of the grand jurors as foreman."). Whether legislative action actually would be required is a matter of

might vote along racial or sexual lines, unintentionally violating the non-discrimination selection standard.

A third possibility combines self-selection and judicial appointment. The jurors, guided by instructions and criteria from the judge, would caucus privately and select from among their number several candidates. The judge, following consideration of the qualifications of all "nominees," would make a final selection. Indirectly, the judge would be considering all jury members, as the court directed. In theory, the recommendation procedure, unlike the one rejected in *Cofield II*,[182] would be a democratic process in which each juror would have equal opportunity to participate. Again, the problem with this selection method is that jurors themselves might base their recommendations on racial preference.

A fourth alternative is to continue the current practice of judicial appointment. The major shortcoming of this selection procedure, with or without suggestions from jurors, is the absence of uniform, objective criteria on which to base choices. One appropriate objective criterion is prior grand jury experience. Generally about half of the members of each grand jury have served during the previous six month session, and the other half are new to the system.[183] Presumably the experienced jurors, who are familiar with procedure, would be better qualified to facilitate grand jury proceedings than their inexperienced counterparts. Additional objective qualifications could include a high school diploma or equivalency,[184] participation in any community, religious or charitable organization, regular work experience, and willingness to serve.

Trial courts could gather qualification data from jurors quickly and fairly on a simple form. Referring only to the data, the judge could select from among the jurors without regard to race and without employing any subjective criteria. Courts could accomplish the entire procedure quickly and conveniently.[185]

Of the alternatives discussed — totally random choice, selection by the grand jurors, a combination of juror recommendation and judicial selection, and judicial selection alone — the last seems to comport best with the court's directive that "all grand jurors [be] considered by the presiding judge for his selection."[186] The court further instructs trial judges to choose forepersons on a racially neutral basis.[187] To ensure that neutrality, trial judges should consider

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statutory interpretation. The statute indicates that the judge is to appoint the foreperson. *Id.* It does not explicitly require that the judge personally select the individual to be appointed. *Id.* Technically, in a random selection process, the judge also would not choose directly the individual whom he or she appoints.

182. 324 N.C. at 461, 379 S.E.2d at 839.

183. *See* N.C. GEN. STAT. § 15A-622(b) (1988).

184. If this requirement proved too restrictive to avoid disparate impact in particular counties, judges could tailor appropriate criteria.

185. *Amicus* in *Cofield II* discusses time pressures when trial judges make foreperson selections. The brief notes the corollary need for fairness, despite those pressures. Amicus Curiae Brief (North Carolina Civil Liberties Union Legal Foundation) at 27, State v. Cofield 324 N.C. 452, 379 S.E.2d 834 (1989) (No. 8865C762).

186. *Cofield II*, 324 N.C. at 461, 379 S.E.2d at 839.

187. *Id.*

jurors solely on the basis of objective criteria and should select directly, even randomly, from written forms submitted by jurors willing to serve.

In *Cofield I* the North Carolina Supreme Court extended the precise language of article I, section 26 of the state constitution, which refers facially only to empanelling juries, to include the subsidiary selection of forepersons from among selected jurors. In *Cofield II* the court bolstered its earlier decision by clarifying the State's burden to prove absence of discriminatory effect, not merely discriminatory intent. The court interpreted the state constitution to require consideration of all grand jurors, on a racially neutral basis, for the position of foreperson. The court has, however, invited future litigation with its vague consideration standard. The court should avail itself of an opportunity to clarify its standard and to establish means by which trial judges in North Carolina may achieve the desirable constitutional end enunciated in the *Cofield* cases.

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